

**IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH.**

FAO No. 193-M of 2003.

Date of Decision: November 08, 2006.

Hitesh Bhatnagar

....Appellant

through

Mr. G.V.Rao, Advocate with

Mr. R.K.Lamba, Advocate.

Versus

Deepa Bhatnagar

...Respondent

through

Mr. C.B.Goel, Advocate and

Mr. Manoj Sharma, Advocate.

CORAM:

HON'BLE MR. JUSTICE SURYA KANT.

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

SURYA KANT,J.

This appeal is directed against the judgment dated 2.4.2003 passed by the learned Additional District Judge, Gurgaon whereby a petition under Section 13-B of the Hindu Marriage Act, 1955 (hereinafter referred to as 'the Act') for dissolution of marriage by mutual consent has been dismissed on the ground that the respondent-wife has withdrawn her consent within the period stipulated under sub-Section (2) of Section 13B of the Act. The husband is the appellant.

[2]. The brief resume of facts is as follows:-

[3]. The marriage between the parties was solemnised on 19.10.1994. A female child was born out of the wedlock on 13.10.1995. On

17.8.2001 a petition for divorce on mutual consent was filed under Section 13B of the Act and in support thereof, statements of both the parties were recorded. It was thereafter adjourned to 23.2.2002. As the record of the learned trial Court reveals, when the petition was taken up for hearing on 25.2.2002, the petitioners did not appear to make a statement “at the stage of second motion of the petition”. On request, the case was adjourned to 11.3.2002 but the respondent did not turn up and on a request made by the appelllant, the case was further adjourned to 13.3.2002. On 13.3.2002 and also on 23.4.2002, the respondent did not show up due to which, the case was further adjourned. On 20.7.2002, neither the appellant nor the respondent appeared and on a request made on behalf of the appellant, it was further adjourned to 20.11.2002. The respondent's absence on that date also caused further adjournment of the case to 8.3.2003. Since the learned Presiding Officer was on leave on the said date, it was adjourned to 18.3.2003 and on that day too, the respondent remained absent. It was again adjourned to 20.3.2003 but the learned Presiding Officer being on leave on that day, the case was taken up on the next day.

[4]. On 21.3.2003 it was contended on behalf of the appellant that since the respondent has failed to withdraw her consent within a period of 18 months, a decree for divorce by mutual consent be passed in favour of the appellant. On the other hand, learned counsel representing the respondent argued that she has already withdrawn her consent as she does not want her marriage to be dissolved and is keen on residing with the appellant as his wife.

[5]. The case was thereafter adjourned for the next day, i.e., 22.3.2003. On that day, the respondent moved a formal application along

with her affidavit to the effect that she has withdrawn her consent. The case was then heard on merits and the learned Additional District Judge vide his judgment and order dated 2.4.2003, having held that the respondent was within her right to withdraw the consent “even after the expiry of period of 18 months but before passing of the divorce decree”, dismissed the petition, giving rise to this appeal.

[6]. The issue to be determined in this appeal hinges upon the interpretation of Section 13B(2) of the Act. In view of the admitted facts that a petition for divorce by mutual consent was filed by the parties on 17.8.2001 and the respondent had made a statement in support thereof at the time of its presentation and subsequently she withdrew her consent on 21/22.3.2003, the question here arises as to whether or not, the respondent was within her right to withdraw the consent after the expiry of a period of 18 months from the date of presentation of the joint petition?

[7]. In order to appreciate the controversy, it will be profitable to reproduce Section 13B of the Act which reads as under:-

“13B. Divorce by mutual consent.-(1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnised before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be

dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the Court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnised and that the averments in the petitioner are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree”.

[8]. On a plain reading of the above reproduced provision, it may be noticed that a petition for divorce by mutual consent involves two stages. Under Sub-Section (1), the petition can be presented jointly by the parties if they are living separately for a period of one year or more or have not been able to live together and have mutually agreed that the marriage be dissolved. Thereafter, the following steps as contemplated by sub-Section (2) are required to be taken:-

- (i) there shall be a motion by both the parties not earlier than six months after the date of presentation of the petition under sub-Section (1);
- (ii) the joint motion by the parties shall not be made later than eighteen months from the date of presentation of the petition under sub-Section (1); and
- (iii) if the petition is not withdrawn in the meantime;
- (iv) the Court, after hearing the parties and making such

inquiry as it thinks fit, shall satisfy itself, that the marriage has been solemnised and the averments made in the joint petition are true;

(v) thereafter the Court shall pass a decree of divorce declaring the marriage to be dissolved.

[9]. Before advertng to the contentions made by learned counsel for the appellant, it may be noticed at the outset that the question posed herein above, has been squarely answered against the appellant by the Hon'ble Supreme Court in the case of **Smt. Sureshta Devi v Om Parkash, AIR 1992 SC, 1904** wherein it was held that a party to a petition for divorce by mutual consent can unilaterally withdraw the consent and consent once given is not irrevocable. Interpreting sub-Section (2) of Section 13B, their Lordships held as follows:-

“Sub-Sec.(2) requires the Court to hear the parties which means both the parties. If one of the parties at that stage says that “I have withdrawn my consent”, or “I am not a willing party to the divorce”, the Court can not pass a decree of divorce by mutual consent. If the Court is held to have the power to make a decree solely based on the initial petition, it negates the whole idea of mutuality and consent for divorce. Mutual consent to the divorce is a sine-qua non for passing a decree for divorce under Section 13-B. Mutual consent should continue till the divorce decree is passed. It is a positive requirement for the Court to pass a decree of divorce. The consent must continue to decree nisi and must be

valid subsisting consent when the case is heard”.

(emphasis applied).

[10]. There is one more statutory hurdle in the appellant's way. Though a joint petition in terms of sub-Section (1) of Section 13-B of the Act was filed by the parties, however, no 'joint motion' was made by them under sub-Section (2) thereof, either after the expiry of a period of six months or within a period of 18 months from the date of presentation of the said petition. Since a “joint motion” is *sine-qua-non* to proceed with a joint petition, no occasion could arise for the learned District Judge to hold an inquiry with regard to the truthfulness of the averments made therein. The joint petition, thus, was not only liable to be dismissed for the reason that the respondent withdrew her consent before passing of the decree of divorce but also for the fact that no 'joint motion' was ever made by the parties.

[11]. However and in all fairness to learned counsel for the appellant, he has made the following contentions in support of this appeal:-

(i) the consent could not have been withdrawn by the respondent after the expiry of 18 months, i.e., she could have withdrawn the same on or before 17.2.2003;

(ii) the phrase “*not later than*” as contained in sub-Section (2) would mean 'within the time prescribed' i.e., “within 18 months” and not subsequently. Reliance has been placed upon the constitution Bench judgment of the Hon'ble Supreme Court in the case of **Harinder Singh v S.Karnail Singh & Ors., AIR 1957 Supreme Court, 271;**

(iii) in view of the newly added Section 23(1)(bb) of the

Act, a joint petition for decree of divorce by mutual consent, once filed, can be pursued by one party even if the other party does not move a joint motion for the grant of divorce and since the rigors of Section 23 have been fully satisfied in the present case, a decree of divorce ought to have been granted;

iv) the respondent can not be permitted to take inconsistent stand in order to defeat and delay the judicial process with a view to harass the appellant;

v) the respondent has been engaged in prejudicial activities, like, making false complaints to the Army authorities in order to harass the appellant;

vii) the judgment of Hon'ble Supreme Court in **Smt. Sureshta Devi's case (supra)** has been passed without noticing the Constitutional Bench judgment in **Harinder Singh's case (supra)**;

viii) the view taken by the Bombay High Court in the case of **Jayshree Ramesh Londhe v Ramesh Bhikaji Londhe, AIR 1984 Bombay, 302** and the Delhi High Court in the case of **Chandra Kanta v Hans Kumar & Anr., AIR 1989 Delhi, 73**, is the correct view in law”.

[12]. The contentions noticed at No. (i) and (ii), above, are directly in the teeth of the dictum of the Hon'ble Supreme Court in **Sureshta Devi's case** (supra). That apart, there being no 'joint motion' by the parties in terms of sub-Section (2) of Section 13B of the Act, no decree of divorce on mere filing of a 'joint petition' could be passed even if there was no formal

withdrawal of consent by the respondent.

[13]. The reliance placed by the appellant on Section 23(1)(bb) of the Act is also wholly misconceived and antithetical to the legislative policy behind the said provision, which is meant for statutory check and obligates the Court to satisfy itself about the existence of the conditions incorporated in various sub-clauses thereof, even if the divorce petition remains undefended. In other words, mere absence of a party would not mechanically permit the Court to accept the petitioner's version.

[14] That apart, while formally withdrawing her consent, which in fact was never given under sub-Section (2) of Section 13B, she has made very serious allegations of 'fraud', 'duress' and 'undue influence' against the appellant and, thus, ingredients of Section 23(1)(bb) of the Act have also not been satisfied.

[15]. As regard to the reliance placed upon the judgments of the Bombay and Delhi High Courts, suffice to say that these judgments have been over-ruled by the Hon'ble Supreme Court in Sureshta Devi's case (supra).

[16]. Similarly, the contentions at No. (iv) and (v) above are apparently an after-thought and without any basis, especially when the decree of divorce has not been sought under Section 13 of the Act.

[17]. For the reasons afore-stated, I do not find any merit in this appeal which is accordingly dismissed with costs quantified at Rs.5000/-.

November 08, 2006.
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(SURYA KANT)
JUDGE